

MOKTAN (Migration) [2019] AATA 3695 (25 March 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Robin MOKTAN

CASE NUMBER: 1724433

HOME AFFAIRS REFERENCE(S): BCC2015/141211

MEMBER: Meena Sripathy

DATE: 25 March 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 25 March 2019 at 11:48am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Federal Circuit Court remittal – Schedule 3 criteria – application lodged outside of relevant timeframe – compelling reasons for waiver – longstanding genuine relationship – disclosure of sponsor’s previous involvement in a contrived relationship – false claim of being a victim of domestic violence – actively trying to conceive a child – sponsor’s ongoing financial obligations – emotional and psychological dependence – decision under review affirmed
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), rr 1.03, 1.15A; Schedule 2, cl 820.211; Schedule 3, Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285
MZYPZ v MIAC [2012] FCA 478
Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 12 January 2015 on the basis of his relationship with his sponsor, Ms Najma Shresta. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) because the applicant did not meet schedule 3 criteria and the delegate was not satisfied there were compelling reasons for not applying these criteria.
5. The applicant sought review of the decision to the Administrative Appeals Tribunal (differently constituted) and on 26 April 2016 the AAT (first Tribunal) affirmed the decision under review also on the basis that the applicant did not meet schedule 3 criteria and the first Tribunal was not satisfied there were compelling reasons for not applying these criteria.
6. The applicant sought judicial review of the first Tribunal's decision. On 29 September 2017, the matter was remitted by consent from the Federal Circuit Court of Australia on the basis of a concession by the Minister that the first Tribunal fell into jurisdictional error by erroneously concluding that the existence of a genuine relationship does not, of itself, constitute a 'compelling reason' for the waiver of Schedule 3 criteria.
7. The applicant appeared before the Tribunal on 12 February 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The applicant is a 32 year old man of Nepalese nationality. He has parents and two sisters in Nepal. He is sponsored by a 32 year old Australian permanent resident who was born in Nepal and came to Australia in September 2008. She was granted Australian permanent residence (skilled independent visa) in November 2013. The sponsor has parents and two siblings in Nepal and a sister in the USA. The parties claim to have first met in February 2009 at Central College Redfern, and commenced their relationship in June 2014. They married on 6 December 2014 in Strathfield. The review applicant indicates he has not had any previous relationships. His sponsor was previously married to Kripa Lama from March 2012 to May 2014, and this relationship ended in divorce, a copy of which was provided with the application. Neither the applicant nor sponsor have any children.
10. The applicant submitted various documents in support of the application including a joint bank account statement, utility bills in joint names, receipts for items bought together, two Form 888s and some photos of the couple together.

11. On 21 September 2015 the applicant was requested by the Department to provide submissions addressing the Schedule 3 criteria or compelling reasons why these should not be applied in this case. In response the applicant's representative provided a submission and supporting documents including photos of the couple and a report from Dr Ishrat Ali dated 15 October 2015. The submission argues that the applicant and sponsor first met in February 2009 as students, and the applicant supported the sponsor when she was experiencing domestic violence in her previous relationship. They subsequently started dating and married in December 2014. It is submitted that they have now been together for more 2 years. It is submitted the applicant and sponsor have borrowed money jointly and the sponsor cannot meet the repayments without the applicant's contribution. It is submitted as a victim of domestic violence, the sponsor was deeply affected and as a result she is totally dependent on the applicant for her daily needs.
12. The applicant and sponsor appeared before the first Tribunal at two hearings to give evidence relating to the Schedule 3 issue and compelling reasons for not applying the Schedule 3 criteria. Relevant details of their evidence is included in the first Tribunal's decision record, a copy of which is before this Tribunal.
13. Before the present Tribunal, the applicant provided the following further evidence:
 - A joint bank statement for the period July-December 2018
 - Receipts relating to the applicant and sponsor's wedding and reception on 14 February 2017
 - Photos of the couple and others in social settings
 - Form 888 from Shrestha Rajju, long term friend of the sponsor attesting to the genuine and ongoing relationship
 - Itinerary for a holiday in Tasmania 9-18 February 2018
 - Letter from Sponsor's GP dated 26 January 2019
 - Evidence of travel by Tularam Moktan (review applicant's father) to Sydney 19 February 2017 to 12 April 2017, and extracts from his Nepalese passport.
 - Letter advising of grant of a Partner Subclass 100 visa to Rubi Kansakar Thapa on 13 July 2018 - no reference to the relevance of this indicated.
14. On 12 February 2019 the applicant and sponsor appeared before the present Tribunal. The Tribunal took evidence from them about their current circumstances, the circumstances of their relationship (including the inception and development of the relationship and financial, social, household and nature of their commitment), and circumstances they want the Tribunal to consider regarding why the Schedule 3 requirements should not apply in the applicant's case.
15. A summary of the evidence given by the parties follows. The applicant gave evidence of his current address and history of addresses since the application was made. He is currently living with the sponsor and another married couple in a 2 bedroom apartment. Prior to this they lived in a one bedroom apartment in Riverwood for about one year, and before that they lived for a couple of years in a three bedroom apartment also in Hurstville, with his cousin and her cousin. In her evidence the sponsor also mentioned that her ex husband Kripa Lama lived with them in the first apartment in Hurstville.

16. The applicant told the Tribunal he works casually doing car detailing work. He acknowledged that he did not have work permission and has not had work permission since his last substantive visa expired, and so is limited in the work he can do. The sponsor works. She currently has two jobs, with Service NSW and Bunnings. She only started the Service NSW job very recently. She is continuing with the Bunnings job because the other one is not as yet permanent.
17. He came to Australia in 2008 on a student visa, but ceased studying in 2009 when he could no longer afford the fees. His last substantive visa expired in July 2010 and he acknowledged that this is more than 28 days prior to the lodgement of this application and therefore he cannot meet Schedule 3 requirements. Between 2010 to 2015 he remained in Australia because his parents did not want him to return to Nepal at that time due to the circumstances there. Then he met the applicant and he decided to stay.
18. The Tribunal asked the applicant about the relationship. He said they met in early 2009 through mutual friends. She was a student also. She subsequently married a different man, named Kripa. The applicant was unsure if it was arranged or not. He said he heard that her relationship went through ups and downs and eventually she separated from him. He said that after that she came to him for emotional support and they became close, eventually developing into a relationship.
19. Later in the hearing the applicant disclosed that in fact the sponsor's relationship with Kripa was never a genuine relationship. Their arrangement was solely for the purposes of getting him (Kripa) a permanent visa. The applicant told the Tribunal that in fact he and the applicant were in a relationship all along. She could not include him in her application for permanent residency because he did not hold a substantive visa at that time. The applicant's disclosure was confirmed by the sponsor in her evidence to the Tribunal. These admissions were made to the Tribunal when it discussed with the applicant and sponsor its concerns that the sponsor's divorce was obtained in Nepal rather than Australia and concerns about evidence that the sponsor and her ex-husband travelled together to Nepal in January 2015, following their divorce. The sponsor elaborated that she and Kripa had an arrangement for the purposes of the visa application and after it was obtained, they wanted to get on with their lives. He returned to Nepal in 2014 and made arrangements for the divorce. She did not think it mattered whether it was obtained there or here. Regarding travel with him to Nepal, she admitted that he was known to her family and attended her brother's wedding at that time. The sponsor told the Tribunal there was never any domestic violence in her relationship with Kripa.
20. The applicant and sponsor married in December 2014. They had commenced living together prior to that time. They have lived together continuously since then, alone and in shared arrangements with others. They share living expenses but as the applicant has had limited capacity to earn the sponsor has covered more of the expenses. They share domestic duties, both engaging in cooking and cleaning duties.
21. They have taken shared holidays together including to Tasmania in 2018 and Gold Coast with their housemates. The applicant was aware of the sponsor's visit to Nepal in 2015 (although he did not appear to be aware that Kripa travelled with her on that occasion. It was when this was revealed to him by the Tribunal that he made the disclosure mentioned above regarding the non genuineness of that relationship.)
22. In February 2017 the applicant and sponsor held a second 'traditional' marriage ceremony, to which they invited their parents. The sponsor's parents, sister and her niece came from overseas and the applicant's father also came, but his visa was granted the day before the function so he arrived the week later. An album relating to this event was shown to the Tribunal.

23. Regarding financial aspects of the relationship the applicant said they have a joint account and the sponsor has accounts in her own name. Most bills and rent and expenses are paid by her out of her account. The sponsor in her evidence told the Tribunal the applicant has access to her accounts and makes arrangements to pay bills from her account. The sponsor obtained a car loan to buy a new car. The applicant and sponsor each acknowledged that this loan was taken by her alone and she was assessed on her income alone for it. Due to his limited financial capacity they have not made any other financial acquisitions.
24. When asked if the sponsor declares the applicant for tax purposes, neither the applicant nor the sponsor was sure. The sponsor said she has named the applicant as her next of kin to all employers.
25. Regarding plans for the future both the applicant and sponsor referred to their plans and desire to start a family, but they have been experiencing some issues relating to the sponsor to date. They are seeking medical advice and following their GP's suggestions at present. They plan to see a gynaecologist in the future if they continue to have issues. They would like to buy a house together and continue to live a shared life.
26. The applicant said the sponsor relies on him emotionally and psychologically for support. Whenever she has been through difficult experiences he tries to comfort and support her. He gave examples of when her sister passed away (although he could not recall when exactly this happened). He has accompanied her to the GP to discuss fertility issues and was familiar with her issues. The sponsor in her evidence, referred to the applicant giving her support when her sister passed way, which she stated occurred on 8 May 2011, and the support and comfort he gave her during the time of the Nepal earthquake when she was worried about her family. The applicant and sponsor both also referred to a recent incident where the applicant took the sponsor to the hospital in the middle of the night because of an issue she was having with her eyes.
27. The Tribunal asked the applicant what it would like the Tribunal to consider as compelling in this case. He said their relationship is genuine and has now been ongoing for many years. They have celebrated with two marriages already, including their parents in the celebration. The experience of this application has caused the applicant and sponsor a great deal of mental stress. They are genuinely trying to conceive a baby but the sponsor has numerous health related obstacles. The Tribunal asked the applicant why, given the sponsor comes from the same cultural and linguistic background and has family in Nepal, she cannot accompany him or at least visit him while he is awaiting the outcome of the application. He said they have discussed this but she cannot because it will infringe on her career development, she has commitments here including financial commitments (her car loan) and they are genuinely trying to get pregnant. The sponsor in her evidence referred to her health issues, employment and financial circumstances as the reasons she cannot return to Nepal with the applicant while his offshore application is processed. She told the Tribunal she is wholly dependent and reliant on the applicant for daily emotional support and cannot imagine her life without him.
28. On 5 March 2019 the Tribunal wrote to the applicant under s359A and put to him evidence given by the sponsor at the hearing which, subject to his comments or response, would be the reason or part of the reason for affirming the decision under review. Specifically, the Tribunal put particulars of the sponsor's evidence that her previous marriage to Kripa Lama was not genuine and that she was not the victim of domestic violence at the hands of Kripa Lama as claimed earlier to the Department, and the consequences of its reliance on this information. To date no response has been received to this correspondence.

29.

30. FINDINGS AND REASONS

31. The issue in the present case is whether there are compelling reasons for not applying the Schedule 3 criteria: cl.820.211(2)(d).
32. In the course of the application a number of matters have been submitted to the Department, first Tribunal and present Tribunal as compelling reasons. Before the Department, it was submitted by the applicant's (then) representative on his behalf, that the parties had been in a long standing relationship by this time; that they had joint liabilities to which the applicant needed to contribute; and the sponsor was a victim of domestic violence and needed the applicant's support. Before the first Tribunal the sponsor gave evidence about her medical issues and reliance on the applicant and the applicant referred to the length of time he had been in Australia and reluctance to return to Nepal.
33. Before the present Tribunal the applicant and sponsor made disclosures which have discredited some of the earlier submissions (specifically that the sponsor's previous marriage relationship was non genuine, and never involved domestic violence). The applicant and sponsor reiterated that they have been and continue to be in a long standing genuine relationship; that the sponsor is reliant on the applicant for emotional, psychological support; and they are actively trying to conceive a child.
34. Given the applicant is relying, among other reasons, on the fact that he is in a genuine and now longstanding relationship with the sponsor, the Tribunal has considered at the outset whether the parties are in a spouse relationship.

Whether the parties are in a spouse or de facto relationship

35. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
36. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).

Are the parties validly married?

37. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. A certificate of marriage was provided to the Department with the application evidencing that the applicant and sponsor married in Australia on 6 December 2014. The sponsor claims to have divorced her previous husband in Nepal on 15 May 2014, and provided a document to that effect. Although it has some concerns about why they obtained an overseas divorce rather than one in Australia (given both parties were domiciled here at the time), the Tribunal accepts for present purposes, and given the relevance to the overall outcome of the matter, that the applicant and sponsor were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

38. In forming an opinion whether they are in a spouse relationship, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
39. The Tribunal has considered the oral and documentary evidence provided by the applicant and sponsor to the Department and Tribunals to date about the inception and development of the relationship, their living and financial arrangements since they have been together and social aspects and nature of their commitment to each other. They revealed to this Tribunal that their relationship has been ongoing for even longer than previously claimed, as they were in a relationship while the sponsor was married to her previous husband who was included as a dependent on her skilled permanent visa application. The Tribunal considers their disclosure of an earlier contrived relationship is concerning and reflects poorly on, in particular, the sponsor's integrity and credibility. However, the genuineness of the previous relationship is not strictly the issue before this Tribunal. For present purposes, on the evidence before it, the Tribunal accepts that the applicant and sponsor have been living together since at least 2014 and continue to live together to date. The Tribunal accepts that they have been pooling financial resources in a manner consistent with a married couple since this time. They have maintained a joint bank account to date, and the Tribunal accepts the applicant has access to the sponsor's bank account (in her own name) and makes payments from it. It accepts on their oral evidence that at present the sponsor is the primary earner and is financially supporting the applicant, as he has not had work permission. It accepts that they have little in the way of joint assets or liabilities but this is due to the applicant having limited or no work rights throughout the period of the application. The Tribunal accepts that the parties represent each other to family and friends as a couple, and their celebration of a second wedding ceremony to which significant family members travelled from overseas supports this. The Tribunal is satisfied on the evidence of the parties that they draw companionship and emotional support from each other, have been in a relationship for over 4 years and possibly significantly longer, and that they see the relationship as long term.
40. Having considered all of the circumstances of the relationship the Tribunal is satisfied they have a mutual commitment to shared life to the exclusion of others; are in a genuine and continuing relationship; and they live together. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and continues to be met now.
41. Therefore the applicant meets cl.820.211(2)(a).

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

42. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
43. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

44. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
45. In the present case the applicant's last substantive visa expired on 7 July 2010 and the present application was made on 12 January 2015. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

46. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
47. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
48. The Tribunal has carefully considered all of the submissions and arguments made in the course of the application as to the compelling reasons for not applying the Schedule 3 criteria in this case.
49. Among these are that the applicant and sponsor are, and continue to be, in a genuine relationship which is now longstanding. On the basis of the findings made above, the Tribunal accepts that they are in a genuine spousal relationship and accepts that they have been living together in this relationship since at least 2014, now over 4 years. It accepts that that this would be considered a 'long term partner relationship,' noting the definition of this term in r.1.03 of the Regulations as 'not less than 3 years'. The Tribunal also accepts that the applicant and sponsor are trying to conceive a child and wish to be together for this reason. However, taking into account other circumstances arising in this matter, discussed further below, the Tribunal is not sufficiently convinced that the duration of their relationship or desire to stay in Australia to try and conceive a child are compelling reasons to waive the Schedule 3 criteria in this case.
50. The Tribunal also does not consider the sponsor's ongoing financial obligations are a compelling reason for the applicant to be permitted to make his application onshore. The evidence before it indicates the applicant has not had permission to work in Australia for some years and so he has been dependent financially on the sponsor to date rather than her relying on his financial support to meet her obligations. Her outstanding loan, in any event, was taken out after the application was made and on the basis solely of her own earning capacity, and for this reason the Tribunal does not consider the circumstances of her financial obligations, or their desire to buy a house, as compelling. The Tribunal also does not accept that the medical evidence before it, or oral evidence of the parties, supports the dependence claimed by the sponsor on the applicant. The Tribunal is not satisfied that the sponsor is emotionally and psychologically dependent on the applicant for her daily needs as claimed. The Tribunal finds there is nothing unique or compelling in her health or other circumstances to support the level of claimed dependence. While the Tribunal accepts that a period of separation may cause the applicant and sponsor a degree of emotional hardship it is not convinced, in all the circumstances, that this is a compelling reason to waive the

Schedule 3 criteria. It is not convinced that infringement on the sponsor's career development or disruption of her employment or financial hardship if she were to accompany him to Nepal are compelling reasons to waive the Schedule 3 criteria, in light of all the circumstances and her common cultural and linguistic background and family she has there.

51. The Tribunal has also considered the circumstances of the applicant's past migration history and the applicant and sponsor's disclosure that the sponsor's relationship with her previous husband was never genuine and was contrived for the purposes of securing him a visa. The applicant's student visa expired in July 2010 and he remained in Australia without a valid visa until the present application was lodged in January 2015. His given reasons for his stay in this period, which the Tribunal does not find compelling, are that parents did not want him to come back to Nepal due to (unspecified) circumstances there, and he met the sponsor. On their own evidence, the applicant and sponsor's relationship commenced in this period, and the applicant had knowledge of the sponsor's arrangement to secure a visa (granted in November 2013) for a third person on the basis of a contrived relationship. Their involvement in a contrived relationship is of concern to the Tribunal and reflects poorly on both of them with regards to their credibility and integrity. While the Tribunal makes no determinative findings about the sponsor's relationship with her ex husband (because it has limited evidence about the specifics of this and it is not strictly the issue before the present Tribunal), it does consider the applicant and sponsor's admissions on the matter to be a relevant circumstance in its consideration of whether there are compelling reasons for not applying the Schedule 3 criteria in this application. The disclosure and the sponsor's evidence at hearing also undermines the submission made earlier in this application that the sponsor was the victim of domestic violence in her previous relationship. The Tribunal looks most unfavourably on their willingness to make false claims in support of their arguments for compelling reasons.
52. The applicant has had numerous opportunities during the course of this application to depart Australia and commence an application offshore. He could have done this when the Department first refused the application on the basis of not being satisfied there were compelling reasons for not applying the Schedule 3 criteria in November 2015. He could have done it again when the first Tribunal affirmed that decision in April 2016. Before the present Tribunal he has admitted that the sponsor was involved in a contrived relationship which led to the grant of a partner visa to a third party, and that he and the sponsor have been in a genuine relationship throughout the period of her claimed previous relationship and seeks to argue that their long standing genuine relationship is a compelling reason to waive the Schedule 3 criteria in this case. For these reasons the Tribunal finds the circumstance of a longstanding relationship is not a compelling reason to waive the Schedule 3 criteria in the present case. In so finding, the Tribunal is not of the view that the existence of a long standing relationship can never be a compelling reason to waive the Schedule 3 criteria, it simply concludes, having taken into consideration the circumstances surrounding the prolonging of the relationship in the present matter, it does not consider it a compelling reason in this case.
53. Ultimately considering all of the circumstances and reasons put forward by the applicant, individually and cumulatively, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria in the present case. Having regard to all the evidence, it finds the circumstances are not sufficiently powerful to lead the Tribunal to make a positive finding to waive the requisite criteria in the present case.
54. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii) and the applicant does not satisfy the criteria for the grant of the visa.

DECISION

55. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

56.

Meena Sripathy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.